

REPLY TO
ATTENTION OFDEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT
600 ARMY PENTAGON
WASHINGTON DC 20310-0600

DAIM-FDF -E (420-49)

OCT 15 1998

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Privatization of Army Owned Water Systems – Water Rights

1. References:

a. Department of Defense Reform Initiative Directive #9 – Privatizing Utility Systems, 10 Dec 97.

b. HQDA, OACSIM (DAIM-FDF-U) memorandum dated 3 Dec 97, subject: Policy and Procedures for the Privatization of Army Owned Utility Systems at Active Installations – UPDATE.

c. HQDA, ASAILC memorandum dated 24 Nov 95, subject: Policy Guidance on Water Rights at Army Installations in the United States. (Enclosure)

2. The purpose of this memorandum is to provide guidance for privatizing Army installation water systems that have Army-owned surface or ground water supplies.

3. Installations can privatize their water systems without relinquishing or transferring water rights as a condition of privatization. A water right, which is a property right similar to real estate, is a right to use water rather than ownership of the water itself. The authority to divert or pump water on behalf of a water right owner (the Army) may be assigned to a water distribution provider without relinquishing any ownership in that water right.

4. Water is a vital resource everywhere in the United States. Each state has a system of water laws that defines the legal status of water rights and regulates the use of surface and groundwater. Water rights laws vary significantly from state to state, but generally fall into one of three doctrines of water law: riparian, prior appropriation, and hybrid. Installations must become familiar with state water laws and the referenced guidance on water rights to ensure that the Army's rights to water are protected, whether or not the water system is privatized.

5. Water rights must be considered in the privatization study and economic analysis for privatizing installation water systems, from both the economic and the national security perspectives. Water rights may be lost by abandonment or forfeiture and it is incumbent upon the installation to ensure that privatization of the water supply system is accomplished without adversely affecting these rights. The installation should already

DAIM-FDF -E (420-49)

SUBJECT: Privatization of Army Owned Water Systems - Water Rights

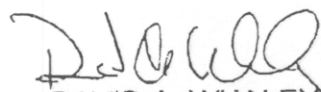
have documentation of its water rights, however, if the documentation is lacking or incomplete, then a determination must be made as to the water rights held under state law and past real estate acquisition.

6. Installation staffs (Contracting, Real Property, and Judge Advocates) shall consult with their MACOM counterparts and the Corps of Engineers Real Estate Offices and receive preliminary concurrence prior to entering into any agreements that involve an assignment of authority to exercise water rights to a private or municipal entity. The Judge Advocate General's Litigation Center, Environmental Law Division can provide legal assistance regarding water rights.

7. In summary, installation water systems that use Army-owned surface or ground water supplies can be privatized. But it is essential that installations understand water rights law and take no action to privatize water systems that could jeopardize Army interests in those water rights. The Army will assert all claims and take all actions necessary to preserve water rights to surface and groundwater used on installations. This includes Federal reserved rights for present and foreseeable future needs for water on land reserved from the Public Domain, where the use is necessary for the primary purpose(s) of the reservation. Finally, water rights may have an impact on the economic feasibility of privatizing the water system as well as the ability of the installation to carry out defense and national security missions.

8. The OACSIM point-of-contact for this action is Mr. William F. Eng, DAIM-FDF-E, (703) 428-7078, DSN: 328-7078, E-mail: engw@hqda.army.mil.

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SUBJECT: Privatization of Army Owned Water Systems - Water Rights

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DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
INSTALLATIONS LOGISTICS AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

November 24, 1995



MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Policy Guidance on Water Rights at Army
Installations in the United States

Purpose. This memorandum and the accompanying appendices set policy and instructions on how water rights information will be documented and protected at Army installations in the United States.

Reference. A list of references is contained at Appendix E.

Definitions. Terms used in this memorandum and the accompanying appendices are defined in Appendix F.

Background.

a. General.

(1) Water is a scarce resource throughout the Western Continental United States, and there is a growing scarcity in some parts of the Eastern United States. In some areas, increasing demand for water to support growing populations and economic development places demands upon the same supplies of surface and ground-water upon which Army installations depend. Several Army installations have become involved in litigation over rights to the use of water and, as the competition for water increases, other Army installations will likely become involved in litigation over water supplies or in adjudication suits to determine water rights among users from the same source.

(2) A water right is property, in some respects similar to real estate. A water right, however, is a right to use water rather than ownership of the water itself. Although water rights are property, there is no Army policy or guidance on the maintenance of records and other information necessary to establish the existence of water rights and to maintain their value and viability.

-2-

b. Water Law Doctrines. In general, there are three doctrines of water law in the United States: riparian, prior appropriation, and hybrid.

(1) Most States in the Eastern half of the country follow a version of the riparian doctrine. Under the riparian doctrine, landowners have special rights to make use of water in a waterway adjoining their property. There is generally no right to use water on non-riparian land. Riparian rules, however, have been altered by statute and case law. One common alteration is the requirement for riparian owners to obtain a permit from a State agency in order to use water. Permits may also be available to non-riparians.

(2) In the West, where water is scarce, application of the riparian doctrine would not meet local needs. This led to the development of the prior appropriation doctrine, which requires water to be put to a beneficial use and bases water rights on the "first in time, first in right" principle.

(3) The hybrid doctrine states originally recognized riparian rights but later converted to a system of appropriation while preserving existing riparian rights. Appendix A contains a list of States that follow the hybrid or prior appropriation doctrine.

c. Army Science Board Findings. In 1988, the Army Science Board conducted a year-long study of Army installations in the Western United States, examining every aspect of the Army's water supply and management practices. In its report, the Board made the following findings, among others:

(1) In the Western States, water rights are complicated and contentious issues. Each State has its own system of water laws governing the allocation and use of surface and groundwater, and the legal framework varies significantly from one State to another.

(2) Installation personnel involved with water rights appear to be faced with a lack of clear Army policy guidance, inadequate lines of legal authority and responsibility, and insufficient expertise in water law.

-3-

(3) At some installations, neither the Staff Judge Advocate (SJA), nor the Director of Engineering and Housing/Director of Public Works (DEH/DPW) staff, understood the importance of maintaining records to protect a water right, what records they should maintain, and how to file and retrieve records when required.

d. Army Science Board Recommendations. The Army Science Board recommended that the Department of the Army adopt a policy statement regarding water rights issues and the Army's responsibility for complying with State water law. They noted that the policy should set forth instructions on how water rights information should be documented and protected at Army installations. This memorandum and the accompanying appendices implement that recommendation.

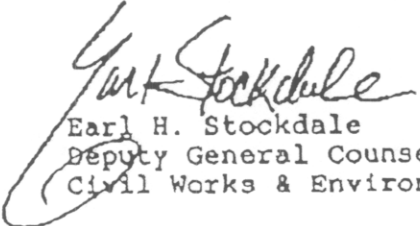
Applicability.

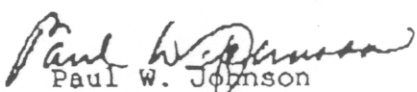
a. Appendix B sets forth general policies and instructions and applies to all Army military installations in the United States. Appendix C sets forth specific policies and instructions for military installations located in States following the doctrine of prior appropriation or a hybrid (see Appendix A), or that are made up in whole or part of reserved land. Appendix D sets forth policies and instructions for military installations located in States following the riparian doctrine.

b. The policy and instruction set forth in this memorandum and the accompanying appendices apply to water in streams, lakes, springs, reservoirs, aquifers, or other bodies of surface or groundwater on, under, touching, or otherwise appurtenant to land owned by the United States and administered, controlled, or used by the Department of the Army. It is also applicable to water being diverted from sources off the installation and conveyed onto the installation for use thereon and to shares in mutual ditch companies owned by the United States and administered, controlled, and used by the Army. It is not applicable to Army Corps of Engineers' Civil Works facilities or water supplied to installations from sources off the installation, pursuant to contracts with municipalities or other suppliers of water.

-4-

c. The policy and instruction set forth in this memorandum and the accompanying appendices are also applicable to uses of water on Army military installation real estate by tenant activities, both private and governmental. Commanders of Major Army Commands responsible for Army real property being used by another entity are responsible for implementation of the policies and procedures contained herein to identify and protect water rights associated with such property. Commanders may seek reimbursement from the tenant activity for the specific costs involved in implementing this policy at the respective individual installations. In the case of leased land or land used by the Army under permit from another Federal agency, installations should request guidance from the Office of The Judge Advocate General, Environmental Law Division.


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APPENDIX A
STATES FOLLOWING THE DOCTRINE OF PRIOR
APPROPRIATION OR A HYBRID THEREOF

Alaska

Arizona

California

Colorado

Hawaii

Idaho

Kansas

Mississippi

Montana

Nebraska

Nevada

New Mexico

North Dakota

Oklahoma

Oregon

South Dakota

Texas

Utah

Washington

Wyoming

APPENDIX B
GENERAL POLICY GUIDANCE

1. Policy.

a. The Army will assert Federal reserved rights for present and foreseeable future needs for water on land reserved from the public domain, where the use is necessary for the primary purpose(s) of the reservation.

b. The Army reserves the option to assert Federal preemption of State water law on a case-by-case basis, under the following conditions:

(1) The application of State law will prevent or adversely affect the Army's ability to accomplish its statutory missions; or

(2) Where a State either declines to recognize existing uses of water or recognizes existing uses of water but applies State law in a manner that results in rights inferior to those the Army would otherwise be entitled to, because the Army failed to comply with State law or administrative regulations pertaining to the appropriation or use of water.

(a) that existing at the time the Army initiated the use of water; or

(b) that were enacted or promulgated thereafter.

c. Assertion of any Federal preemption rights under subparagraph 1b of this Appendix requires approval by the Environmental Law Division (ELD), the Office of the General Counsel of the Army (OGC), and coordination with the Department of Justice.

d. To the extent they are consistent with Federal law and the needs of national defense, the Army will comply with the applicable laws of the States pertaining to the use of water.

2. Water Rights Coordinators/Points of Contact. Each Major Command (MACOM) Commander will designate a Water Rights Coordinator to supervise implementation of this policy for that MACOM. Each installation should designate water rights points of contact from the DEH/DPW and Staff Judge Advocate (SJA) offices to supervise implementation of this policy for the installation.

3. Newly Acquired or Reserved Lands. The memorandum and accompanying appendices apply to newly-acquired lands. For lands purchased or condemned, the Army will, consistent with the policy stated in paragraph 1 of this Appendix, comply with applicable

State law in the appropriation and use of water and in the use of any water rights that may be purchased or condemned along with the land, including complying with State law and procedures governing changes in use or point of diversion. For land reserved from the public domain, unless the terms of the reservation provide expressly that no water is reserved, installation commanders will comply with the procedures specified in Appendix C.

4. Applications for New Uses of Water. Either of the following procedures is applicable to the initiation of new uses of water from sources on, under, or outside the installation, depending upon the status of the land. Prior coordination with the MACOM legal office and Water Rights Coordinator and approval of ELD is required before following either procedure.

a. On reserved land. For new uses of water from sources on, under, or touching the reservation, the installation commander will notify the State water administrator that the installation is exercising a reserved right that vested on the date of the reservation and will supply all information on the use of water that would normally be required of an applicant for a water right under State law. If, however, the reserved rights for the installation have been quantified by court decree and the new use exceeds the amount specified in the decree, the installation must either:

(1) retire or reduce an existing use so that the total decreed amount is not exceeded, or

(2) apply under applicable State law for the excess over the decreed amount.

b. On acquired land. Apply for a water right according to applicable State law and procedures. If the State or other parties oppose the application on the ground that the application is inconsistent with State law or on similar grounds, the installation commander will evaluate the situation in accordance with the policy stated in paragraph 1 of this Appendix and will coordinate with ELD.

c. Point of diversion off the installation. If it is necessary to locate the point of diversion for a new water right off the installation, it will be necessary to acquire an easement or right-of-way. The normal procedures for acquisition of real property and interests therein apply.

5. Military Contingencies. In the event there is not sufficient water available to the installation commander during times of mobilization for a national defense emergency or other military contingency, and the commander decides that additional water is

necessary to accomplish the mission, it may be necessary to consider measures to supplement the installation's water supply. These measures could include:

a. Purchase or lease of water. Most States have provisions for purchase or lease of water. Where it is not feasible to make new appropriations or exercise reserved rights to meet contingencies, installation commanders should analyze whether additional water necessary to cover contingencies should be procured by contract or other agreement. It is also possible in some States to arrange for temporary changes or even to complete change proceedings for the supplemental supply of water in advance. Installation commanders may consult local technical experts in formulating and implementing contingency plans for obtaining supplemental water supplies.

b. Condemnation. Condemnation of water rights to provide an additional water supply in times of emergency is an alternative. Condemnation of water rights, however, may prove contentious and expensive and should be avoided in favor of thorough prior planning to avoid such a necessity. In any event, condemnation of water rights requires coordination with the MACOM legal office and Water Rights Coordinator, ELD, OGC, and approval by the Department of Justice.

6. Fish and Wildlife and Endangered Species. Installation commanders should, to the extent possible under State law, assert water rights for water used in fish and wildlife and endangered species programs. Many States recognize fish and wildlife as a beneficial use, provided there is a diversion of water. In many Western States, however, only specified State agencies may apply for and hold instream or in situ water rights. Further, in the case of land that has been reserved from the public domain for a military purpose and that is also being used for fish and wildlife or endangered species conservation pursuant to statutory authority, such use is not normally recognized as being within the primary purpose of a military reservation.

7. State Permits to Drill Wells. Many States regulate the extraction of groundwater by requiring permits to drill wells. Permit applications to drill wells should be coordinated in advance with the MACOM legal office, MACOM Water Rights Coordinator, and ELD. The following considerations apply:

a. On acquired land and certain uses on reserved land, installation commanders normally will obtain State well permits for uses of water before drilling any well on acquired land and comply with the terms and conditions of such permit. Installation commanders also normally will obtain State well permits for proposed uses of water on reserved land where the proposed uses are not within the primary purpose for which the land was reserved.

b. On reserved land for uses within the primary purpose of the reservation, State permits are not prerequisites to exercising Federal reserved rights. Installation commanders, however, normally will submit an application for a well permit to the appropriate State official as a matter of comity and will include the following language on the application itself and on the cover letter addressed to the State official:

The well that is the subject of this application is intended to supply water necessary for the primary purpose of land reserved from the public domain on [date]. This application is made as a matter of comity and is not to be construed as a waiver of the Federal reserved water right that vested on [date].

If the State official denies the application, refuses to issue a permit, or issues a permit purporting to limit the use of the reserved right, which is consistent with the purpose of the right or the law of reserved rights, the installation commander will advise the MACOM legal office, MACOM Water Rights Coordinator, and ELD.

8. State Filing Fees. Normally, filing fees are required for applications for State water rights or permits to construct a well. Ordinarily, the Army will not pay these fees. Prior to payment of any State filing fee, installation commanders will obtain approval and guidance from ELD. In some instances, for example where rights or priority dates may be jeopardized, ELD may approve payment of fees under protest and attempt to recover the payment. In other instances, ELD may approve attempting to apply for permits without payment of fees.

9. Signing of Applications. Installation commanders may delegate authority for signing applications for water rights to their DBH/DPW. In States where applications for water rights are made to a court either in an adjudication to which the United States is a party or in Colorado, the Department of Justice attorney having responsibility for the adjudication will sign the applications or other papers to be filed in court on behalf of the United States. A person from the installation with personal knowledge of the facts contained in the application must sign any verification statements that may be required.

APPENDIX C
POLICY GUIDANCE FOR INSTALLATIONS IN STATES
FOLLOWING THE DOCTRINE OF PRIOR APPROPRIATION,
A HYBRID THEREOF, OR THAT CONSIST IN WHOLE
OR PART OF RESERVED LAND

1. Identification of Water Rights and Supporting Data and Records. Commanders will identify each water right on the installation and determine, assemble, and maintain the following information on each right:

- a. Name of diversion structure (e.g., Pershing Ditch, Well No. 21, Big Reservoir).
- b. Location of point of diversion (legal description).
- c. Means of diversion (e.g., dam, well, weir, etc.).
- d. Source (name of stream or aquifer).
- e. Depth of well(s).
- f. Amount of diversion (for direct flow surface diversion, such as ditches and pipelines, the maximum diversion rate in cubic feet per second; for wells, the diversion rate in cubic feet per second or gallons per minute; for reservoirs, the active storage capacity in acre feet).
- g. Date work on appropriation was initiated.
- h. Date water was applied to beneficial use.
- i. Date the land was reserved from the public domain (if applicable); otherwise, the date the land was acquired.
- j. Use(s) to which water is applied, for example, municipal, industrial, irrigation, domestic, military (including training, testing of vehicles and equipment, troop morale and welfare), fish and wildlife, recreation.
- k. Places of use (location legal description).
- l. Means of conveyance (e.g., ditch, pipeline, or combination).
- m. Dimensions of means of conveyance.
- n. Pump nameplate capacity (wells and pipelines).
- o. Copies of all documents regarding the acquisition and history of all water rights acquired. Such documentation includes, but is not limited to, the following:

- (1) Court decrees, permits or certificates;
- (2) History of use, to include records of amounts diverted and used, times of use, and uses made of the water;
- (3) Proof of dates of initiation of work and application of water to a beneficial use such as plans, as-built drawings, photographs, maps, completion reports, newspaper articles, or other records;
- (4) Proof of amounts used, such as diversion records, well pump tests, gauging reports, or calculations;
- (5) For reserved rights (uses of water on reserved lands for the primary purpose of the reservation), the document(s) effecting the reservation, such as Executive Orders or public land orders, including any subsequent additions or modifications. Also, any historical documents concerning the establishment of the reservation.
- (6) Any other documents pertaining to the water right.

p. Any other information the installation commander deems useful or necessary or that the particular State maintains or considers necessary.

q. Failure to adequately document, assert, and preserve water rights may result in the loss of those rights. In this regard, the collection and maintenance of information pursuant to this Appendix should be done as soon as possible, given the availability of resources. Recognizing that expeditious implementation of this policy may be difficult due to increasing manpower shortages, ASA(I,L&E) endorses the use of Judge Advocate General and Corps of Engineers reserve components to support the efforts of the SJA and DEH/DPW offices to implement this policy.

2. Regular Maintenance of Records. Commanders will initiate procedures to measure and record diversions of both surface and groundwater regularly and permanently maintain such records.

3. Maintenance of Water Rights.

a. Records of historical and current use. Water rights require maintenance the same as do other types of government property. For example, if appropriative rights are not used for the purposes for which the appropriation was made, they may be subject to loss by abandonment or forfeiture. Therefore, maintenance of the history of use of a water right is very important. In addition, when appropriative rights are sold or the place of use, type of use, or point of diversion is changed, the history of use is critical to establish the depletions or consumptive effect on the stream from diversions under the right.

installation's water rights, the installation commander will refer the matter through the MACOM legal office and Water Rights Coordinator to ELD.

4. Transfer or Reuse. Commanders will take all reasonable measures to assemble the data specified in paragraph 1 of this Appendix and pass it on to their successor. This is especially important where the successor is a Federal agency, because such information is necessary to protect the property interests of the United States.

5. Use of Water Rights; Excess Water Rights. Commanders will, for those water rights that are the subject of a decree, certificate, or permit, determine whether the right is currently being exercised in accord with the terms and conditions of the decree, permit, or certificate. If the right is not being so exercised, the commander will, where appropriate, initiate a change of water right in accordance with paragraph 7 of this Appendix. If the right is not being used at all, installation commanders will determine if the installation has any further use for the right and the reasons the right has not been used and for how long the right has not been used. If there is no foreseeable need for the right, installation commanders will report that fact to the MACOM legal office and Water Rights Coordinator and ELD. If the installation has further use for the right, the commander will ensure that the right is beneficially used according to the terms and conditions of the decree, permit, or certificate. If the right is not presently being used, but could be used beneficially if changed, the installation commander will, where appropriate, proceed in accordance with paragraph 7 of this Appendix.

6. Contacts With State Water Officials. Commanders, after taking the steps in paragraph 1 of this Appendix, and upon coordination with the MACOM and ELD, will:

a. Provide the State water administrator with a list of all reserved rights (i.e., uses of water necessary to fulfill the primary purposes of the reservation). Include in the list the priority (reservation) date, amount, type of diversion structure, location of point of diversion, uses, location of place(s) of use, source (watercourse or aquifer) and, if the point of diversion is a well, the depth of the well. Advise the State water administrator that the Army expects that the reserved rights will be treated for all purposes as valid water rights according to their amounts and priorities.

b. Provide the State water administrator a compilation of all of the installation's non-reserved water rights. List the priority date, amount, type of diversion structure, location of point of diversion, uses, location of place(s) of use, source (watercourse or aquifer) and, if the point of diversion is a

well, the depth of the well. Provide any other information reasonably requested by the State water administrator. Advise the State water administrator of the policy that, except for water necessary for primary purposes of reserved land, the Army will follow applicable State law in the appropriation and use of water, as stated in paragraph 1 of Appendix B.

c. Request that the State water administrator treat the listed water rights submitted pursuant to subparagraphs 6a and 6b of this Appendix as valid for all purposes, according to the priorities and amounts listed, and offer to provide other information reasonably requested by the water administrator.

d. Promptly advise ELD and the MACOM legal office and Water Rights Coordinator of any response from the State water administrator, whether favorable or unfavorable. If the State water administrator's response is unfavorable, the installation commander will include an assessment of the impact of the unfavorable response on the mission of the installation.

7. Changes of Water Rights.

a. A change of water right means a change in the point of diversion, use, place of use, or other attribute of the water right for which the State law requires a change application be filed. All changes of water rights require prior coordination with the MACOM legal office and Water Rights Coordinator and approval of ELD.

b. Appropriative rights. In most States, the change will be approved if it does not cause injury or impairment to another water right, including junior water rights. The installation commander will file an application according to applicable State law and procedure and be prepared to demonstrate compliance with the specific State law standard for the change requested.

c. Federal reserved rights. The law applicable to changing points of diversion or place of use, as well as other changes of reserved rights, is unclear. Necessary changes within the reservation purpose, however, should be permitted. When it is necessary to change a reserved right, installation commanders will notify the State water administrator of the change and reason for the change and provide the same information that would be required for a change of water right under the State law or procedure. After approval by ELD and notification, the installation commander may proceed to make the change.

8. Administration of Water Rights.

a. When the installation is not receiving its full decreed, permitted, or certified surface water rights amount and when water is needed for application to beneficial use, the

installation commander may request the State water administrator or the local State water official in charge of administration of water rights to deliver the full amount of the installation's rights. Such a request is termed a "call" or "calling the river." Similarly, when the installation receives a request or order from the State official in charge of administration of water rights to cease or curtail diversion, the installation commander will honor the request and cease diversion, except as provided in subparagraph 8b of this Appendix. If it appears to the installation commander that cessation or curtailment will not provide water to a senior appropriator at the time and place the senior needs water, the commander may assert that the call is futile and request the water administration official to reevaluate the order. If the official persists in the order to cease or curtail diversions, the installation commander will comply.

b. The only circumstance under which the installation commander may refuse to honor the call is when to honor the call would be inconsistent with the policy stated in paragraph 10 of this Appendix. Refusal to honor a call will very likely result in litigation. Therefore, before refusing to honor a call, installation commanders will thoroughly document all the facts and circumstances and submit appropriate documentation and a request to refuse to honor the call through the MACOM legal office and Water Rights Coordinator to ELD, which will coordinate the request with OGC and the Department of Justice.

9. Water Shortages.

a. Analysis of existing water rights. Installation commanders will conduct an analysis of the capability of the installation's water rights to provide the installation with the water necessary to continue essential activities under drought or other shortage conditions and upon increased demand due to mobilization or other increase in population or activity. The analysis will take account of the priorities and amounts of the installation's water rights and the supply of water available to satisfy those rights. Factors affecting the supply available include hydrology, the relative seniority of the installation's water rights, and whether the State water administrators recognize the installation's rights as valid.

b. Contingency plan. Upon completion of this analysis, the installation commander will prepare a plan to deal with any contingencies identified in the analysis. For example, if the water rights are critical to the installation's water supply and the analysis indicates that the rights are so junior as not to be reliable, or if the State water administrator will not recognize the installation's rights as valid, the contingency plan should include measures to remedy the problem. Such measures could include, for example, acquiring a reliable replacement supply

Department of Justice has the sole authority to appear and represent the interests of the United States in court proceedings. Once the United States is joined in such an adjudication, there is a limited time in which to submit claims for water rights and marshal proof for the claims. The consequence of failure to submit timely claims is loss of the rights. Failure to marshal adequate proof of the claims will also result in loss or diminution of the rights. Accordingly, in the event that Army installations are water users in a drainage area to be adjudicated, the installation commander will ensure that the necessary resources are assigned to the adjudication. The installation commander will immediately notify the servicing Staff Judge Advocate or legal counsel of service of process pertaining to an adjudication. The servicing legal counsel will notify the MACOM legal office and Water Rights Coordinator and ELD.

APPENDIX D
POLICY GUIDANCE FOR INSTALLATIONS
IN STATES FOLLOWING THE RIPARIAN DOCTRINE

States Not Following the Doctrine of Prior Appropriation or a Hybrid Thereof. Commanders at installations not following the doctrine of prior appropriation or a hybrid thereof, should consult their SJA to determine whether State permits or registration requirements are required for diversion of surface and/or ground-water. If a permit or registration requirement exists, proceed according to the guidance at paragraph 1 of Appendix B.

APPENDIX E
REFERENCES

1. Required Publications. AR 420-46, Water Supply and Wastewater.
2. Related Publications.
 - a. AR 27-40, Litigation.
 - b. AR 405-10, Acquisition of Real Property and Interests Therein.
 - c. Title 10 U.S.C. § 3062, Policy; Composition; Organized Peace Establishment.
 - d. Title 16 U.S.C. § 670a, Conservation Programs on Military Reservations.
 - e. U.S. Department of Justice, Office of Legal Counsel, Memorandum for Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, Federal "Non-reserved" Water Rights, dated 16 June 1982.
 - f. Memorandum of Understanding Between the Judge Advocate General, United States Army, and the Chief Counsel, U.S. Army Corps of Engineers, dated 21 October 1992, regarding the delivery of water law advice to Army installations.
 - g. U.S. Army Corps of Engineers, Institute for Water Resources, Volume III, Summary of Water Rights-State Laws and Administrative Procedures, Apogee Research, Inc., June 1992.
 - h. Army Science Board, Report of the Ad Hoc Subgroup on Water Supply and Management on Army Installations in the Western United States, February 1988.

APPENDIX F DEFINITIONS

1. Abandonment of a water right. Non-use of a water right, coupled with an intent to abandon. Under the law of some appropriation doctrine States, a long period of non-use raises a rebuttable presumption of an intent to abandon. Reserved rights are not subject to abandonment. It is not clear, however, whether other water rights owned by the United States are subject to State laws on abandonment.
2. Acquired land. Land, the title to which was secured by purchase or condemnation, as opposed to being withdrawn or reserved from the public domain.
3. Adjudication. A judicial determination of the amount and priority of water rights in a given drainage basin. In other words, a special type of lawsuit to which all users of water in the basin are parties. The result of an adjudication is a decree fixing the amount and relative priorities of water rights and other essential information, such as point of diversion, beneficial use, place of use, and any limitations on the exercise of the right decreed. Typically, an adjudication is a determination of rights already in existence, which may be evidenced by permit, certificate, or other facts establishing the existence of a water right.
4. Appropriation. A diversion of a specific amount of water and application thereof to a beneficial use.
5. Appropriative water right. A right to divert and use beneficially a specific amount of water for a specific purpose or purposes in accordance with its priority of appropriation.
6. Call. A request made by a senior appropriator who is not receiving its full lawful appropriation to the official in charge of distribution of the waters of the stream to order junior appropriators to cease or curtail their diversions to provide the senior its full entitlement. It is the official's duty to order the juniors to cease or curtail diversions in inverse order of priority until the senior's right is satisfied. (In circumstances where ordering juniors to cease or curtail their diversions will not supply water to the calling senior, the call is ultimately termed "futile" and will not be enforced).
7. Change of water right. A change in point of diversion, place of use, type of use, from direct flow to storage, or any other change in a water right contemplated by State law for which either administrative or court approval is required.

8. Diversion. A taking of water from its natural course or from an aquifer for conveyance to a place of use. A diversion is usually affected by a structure such as a weir, dam, guidewall, well, or the like.

9. Forfeiture of a water right. Loss of a water right for failure to use it for a period specified by statute. Reserved rights are not subject to forfeiture. It is not clear, however, whether other water rights owned by the United States are subject to State forfeiture laws.

10. Point of diversion. The place at which water is diverted from its natural course.

11. Primary purpose. In the application of the Federal reserved rights doctrine to Army installations, "primary purpose" means the specific mission of the installation within the overall mission of the Army, as stated in 10 U.S.C. § 3062. In general terms, that mission is to "be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land. . . . [and] the preparation of land forces necessary for the effective prosecution of war . . . and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Army to meet the needs of war." Uses of water to fulfill the "primary purpose" include all "municipal and industrial" uses of water necessary for self-contained community, including morale and welfare needs of the Army community.

12. Priority date. For a reserved or appropriative right, the date used to determine the relative seniority of the right. Generally, it is the date the work was initiated on the appropriation if the appropriation was completed with reasonable diligence. Otherwise, it is the date water was first put to beneficial use. For a Federal reserved right, it is the reservation date.

13. Riparian right. A right of a riparian landowner to the reasonable use of water from a watercourse to which the land is riparian.

14. Riparian. One who owns land bordering on a watercourse such as a stream or lake.

15. Reserved land. Land withdrawn from entry under the public land laws or reserved by executive action or by statute from the public domain.

16. Reserved right. A water right created by the reservation of land from the public domain for a specific Federal purpose if water is necessary to fulfill the primary purpose for which the land was reserved.

18. Water right. A water right is the right to use water. For purposes of this policy, a water right includes any use of water on the installation no matter whether the use is permitted, decreed or otherwise documented or officially recognized by State or Federal authority.